

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209

RECEIVED
AUG 18 2016
SC Court of Appeals

Emil P. Kondra individually, and as
Trustee of the Emil P. Kondra
Revocable Trust, Emil P. Kondra,
LLC, Emil P. Kondra Family Trust,
Eileen Saxton and Douglass E.
Kondra, as Trustees of the Emil P.
Kondra Family Trust, Douglass E.
Kondra, Helen Perry, and Lawrence F.
D'Alessio,

Respondents

v.

Robert A. Nitsch and Veronica G.
Nitsch, Individually and as Trustees of
the Amended and Restated Veronica
G. Nitsch Revocable Trust and the
Amended and Restated Robert A.
Nitsch Revocable Trust

Respondents

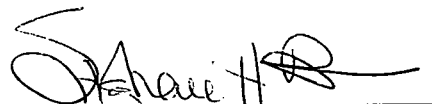
Stephanie H. Burton and Gibbes
Burton, LLC

Appellants.

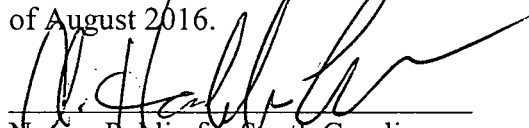
AFFIDAVIT OF STEPHANIE H. BURTON

PERSONALLY APPEARED BEFORE ME, Stephanie H. Burton, who, being duly sworn, states as follows:

1. I am an attorney admitted to practice law in the State of South Carolina and have appeared as local counsel for Defendants, Robert A. Nitsch and Veronica G. Nitsch, Individually and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust in the underlying case from which this appeal arises.
2. A true and correct copy of the April 1, 2016 Affidavit of Stephanie H. Burton in Support of the Motion to Withdraw as Counsel is attached as Exhibit "A."
3. A true and correct copy of the April 1, 2016 Motion to Withdraw as Counsel of Record is attached as Exhibit "B."
4. A true and correct copy of the April 1, 2016 Affidavit of Blair C. Fensterstock is attached as Exhibit "C."
5. A true and correct copy of the April 1, 2016 Motion to Withdraw as Counsel of Record submitted by Blair C. Fensterstock is attached as Exhibit "D."
6. A true and correct copy of Appellants' July 21, 2016 Notice of Appeal is attached as "Exhibit E."
7. A true and correct copy of an action for legal malpractice (C.A. No. 2016-CP-23-04705) filed by Defendants against Appellants and lead counsel is attached as "Exhibit F."


Stephanie H. Burton

Sworn before me this 15 day
of August 2016.



Notary Public for South Carolina

My Commission Expires: 7-13-2020

Exhibit A

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Emil P. Kondra individually, and as Trustee)
of the Emil P. Kondra Revocable Trust, Emil)
P. Kondra, LLC, Emil P. Kondra Family)
Trust, Eileen Saxton and Douglass E.)
Kondra, as Trustees of the Emil P. Kondra)
Family Trust, Douglass E. Kondra, Helen)
Perry, and Lawrence F. D'Alessio,)

Plaintiffs,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

John M. Campbell, Esq.,)

Plaintiff,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2012-CP-23-06209

C. A. No.: 2012-CP-23-06211

AFFIDAVIT OF STEPHANIE H. BURTON IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANTS OF GIBBES BURTON, LLC AND STEPHANIE H. BURTON

PERSONNALLY APPEARED BEFORE ME, Stephanie H. Burton, who, being duly sworn,

states as follows:

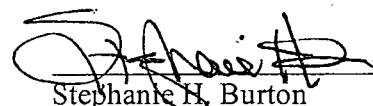
1. On or about October 17, 2012, Gibbes Burton, LLC was retained by Robert A. Nitsch

and Veronica G. Nitsch to serve as local South Carolina legal counsel to represent them both individually and in their capacities as trustees in two actions that had been filed against them in the Court of Common Pleas in Greenville County, South Carolina. Defendants had previously retained Fensterstock & Partners to serve as their primary lead attorneys in the case.

2. Throughout the course of these cases, Fensterstock & Partners served as lead counsel. For example, attorneys from Fensterstock & Partners have made the strategic decisions involving the cases, primarily argued all of the motions that have been heard, prepared the majority of pleadings and other papers in these cases, taken the two depositions that have been taken in these cases, and prepared discovery requests and responses.
3. Fensterstock & Partners has filed a motion to be relieved as counsel in these cases on the grounds that Defendants have not made payments to it in accordance with their agreement.
4. The failure of Defendants to make such payments has made it impossible for Gibbes Burton, LLC or Stephanie H. Burton to provide the limited local counsel services to which Defendants agreed.
5. Defendants have been given reasonable warning that Gibbes Burton, LLC and Stephanie H. Burton will withdraw because Gibbes Burton, LLC and Stephanie H. Burton cannot provide the limited scope of services as local counsel that Defendants agreed upon.
6. Continued representation has been rendered unreasonably difficult by Defendants.
7. Defendants have filed notice of intent to appeal in this case appealing the grant of summary judgment against them. They have retained Jeffrey Dunleavy of Stephenson

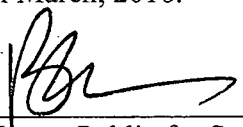
& Murphy, LLC for the limited purpose of representing them in connection with that appeal. Defendants (Appellants) recently served their initial brief in that appeal on Friday, March 25, 2016.

- 8. Defendants have also retained attorney S. Allan Hill to represent them in connection with a claim filed against the Estate of Emil Kondra in the Greenville County, South Carolina probate court.
- 9. Given that the case is currently on appeal, there will be no material adverse effect on the interests of Defendants if Gibbes Burton, LLC and Stephanie H. Burton are permitted to withdraw. There is ample time during the pendency of the appeal for Defendants to identify and locate substitute counsel to represent them at the trial court level in this matter if they are successful on appeal.



 Stephanie H. Burton

Sworn before me this 31st day of March, 2016.



 Notary Public for South Carolina
 My Commission Expires: 01.13.2024

Exhibit B

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

Emil P. Kondra individually, and as Trustee)
of the Emil P. Kondra Revocable Trust, Emil)
P. Kondra, LLC, Emil P. Kondra Family)
Trust, Eileen Saxton and Douglass E.)
Kondra, as Trustees of the Emil P. Kondra)
Family Trust, Douglass E. Kondra, Helen)
Perry, and Lawrence F. D'Alessio,)

C.A. No.: 2012-CP-23-06209

C.A. No.: 2012-CP-23-06211

Plaintiffs,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

**MOTION TO WITHDRAW AS
COUNSEL FOR DEFENDANTS OF
GIBBES BURTON, LLC AND
STEPHANIE H. BURTON**

Defendants.)

John M. Campbell, Esq.,)

Plaintiff,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

To: JOHN M. CAMPBELL, PLAINTIFF AND HIS ATTORNEY, SAMUEL W. OUTTEN;
EMIL P. KONDRA INDIVIDUALLY, AND AS TRUSTEE OF THE EMIL P. KONDRA
REVOCABLE TRUST, EMIL P. KONDRA, LLC, EMIL P. KONDRA FAMILY TRUST,
EILEEN SAXTON AND DOUGLASS E. KONDRA, AS TRUSTEES OF THE EMIL P.
KONDRA FAMILY TRUST, DOUGLASS E. KONDRA, HELEN PERRY, AND LAWRENCE
F. D'ALESSIO, AND THEIR ATTORNEYS, A.M. QUATTLEBAUM, JR. AND SARAH R.

ANDERSON; DEFENDANTS ROBERT A. NITSCH AND VERONICA G. NITSCH, INDIVIDUALLY AND AS TRUSTEES OF THE AMENDED AND RESTATED VERONICA G. NITSCH REVOCABLE TRUST AND THE AMENDED AND RESTATED ROBERT A. NITSCH REVOCABLE TRUST

Gibbes Burton, LLC and Stephanie H. Burton, will move the Court, at such date and time as the Court shall direct, for an order relieving them as counsel for Defendants in these cases.

This motion will be made upon the following grounds:

1. Gibbes Burton, LLC was retained by Defendants to serve as local counsel in South Carolina after these cases were filed. Defendants retained Fensterstock & Partners to serve as primary lead counsel in this case and Blair Fensterstock of Fensterstock & Partners has been admitted *pro hac vice* in these cases accordingly.
2. Throughout the course of these cases, Fensterstock & Partners has served as lead counsel.
3. Fensterstock & Partners has filed a motion to be relieved as counsel in these cases on the grounds that Defendants have not made payments to it in accordance with their agreement.
4. The failure of Defendants to make such payments has made it impossible for Gibbes Burton, LLC or Stephanie H. Burton to provide the local counsel services to which Defendants agreed.
5. Defendants have been given reasonable warning that Gibbes Burton, LLC and Stephanie H. Burton will withdraw because Gibbes Burton, LLC and Stephanie H. Burton cannot provide the limited scope of services as local counsel that Defendants agreed upon.
6. Continued representation has been rendered unreasonably difficult by Defendants.
7. Defendants have filed notice of intent to appeal in these cases appealing the grant of summary judgment against them. They have retained Jeffrey Dunlaevy of Stephenson & Murphy, LLC for the limited purpose of representing them in connection with that appeal. Defendants (Appellants) recently served their initial brief in that appeal on Friday, March

25, 2016.

8. Defendants have also retained attorney S. Allan Hill to represent them in connection with a claim filed against the Estate of Emil Kondra in the Greenville County, South Carolina probate court.
9. Accordingly, there will be no material adverse effect on the interests of Defendants if Gibbes Burton, LLC and Stephanie H. Burton are permitted to withdraw. There is ample time during the pendency of the appeal for Defendants to identify and locate substitute counsel to represent them at the trial court level in these matters if they are successful on appeal.

This motion is based upon the pleadings filed in this action, upon the motion to withdraw filed by Fensterstock & Partners, the affidavit of Blair Fensterstock filed in connection with that motion, upon the affidavit of Stephanie H. Burton, and upon applicable common and statutory law.

s/Stephanie H. Burton
Stephanie H. Burton (#13089)
GIBBES BURTON, LLC
308 East St. John Street
Spartanburg, SC 29302
sburton@gibbesburton.com
Telephone: (864) 327-1725

Attorneys for Defendants

April 1, 2016
Spartanburg, South Carolina

Exhibit C

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Emil P. Kondra individually, and as Trustee)
of the Emil P. Kondra Revocable Trust, Emil)
P. Kondra, LLC, Emil P. Kondra Family)
Trust, Eileen Saxton and Douglass E.)
Kondra, as Trustees of the Emil P. Kondra)
Family Trust, Douglass E. Kondra, Helen)
Perry, and Lawrence F. D'Alessio,)

Plaintiffs,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

John M. Campbell, Esq.,)

Plaintiff,)

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

**AFFIDAVIT OF BLAIR C.
FENSTERSTOCK IN SUPPORT OF
FENSTERSTOCK & PARTNERS LLP'S
MOTION TO WITHDRAW AS
COUNSEL FOR ROBERT A. NITSCH
AND VERONICA G. NITSCH**

C.A. No.: 2012-CP-23-06209

C.A. No.: 2012-CP-23-06211

substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefore and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled"); and/or Rule 1.16(b)(7) ("other good cause for withdrawal exists").

6. The Firm was originally retained by the Nitschs in or about August 2012 to represent them in the above-captioned matters.

7. The Nitschs executed a retainer agreement in which they agreed to pay the usual and customary fees billed by the Firm, together with out-of-pocket costs and disbursements, and to provide a retainer.

8. As part of the retainer agreement, the Nitschs agreed that the Firm has the right to withdraw from its representation of the Nitschs if their fees were unpaid for 60 days.

9. Since August 2012, the Firm has expended significant time, resources, and effort providing legal services to the Nitschs.

10. The Nitschs have failed to pay their outstanding bill, which is currently more than 60 days overdue.

11. The affiant has attempted in good faith to resolve this outstanding bill with the Nitschs, but the Nitschs have not confirmed that they will pay all outstanding fees and costs.

12. As a result, the Firm is moving to withdraw as counsel for the Nitschs in all matters in which it represents the Nitschs.

13. At this point in time, there will be no prejudice to the Nitschs should this Court grant the Firm's motion to withdraw.

14. There is no discovery pending in the above-caption matters, however, there is a scheduled hearing on Plaintiff's motion for attorney's fees set for Thursday, March 31, 2016.

15. On December 21, 2015, the Court issued an Order granting summary judgment to the Plaintiffs Emil P. Kondra, individually, and as Trustee of the Emil P. Konra Revocable Trust; Emil P. Kondra, LLC; Emil P. Kondra Family Tust; Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust; Dogulass E. Kondra; Helen Perry; and Lawrence D'Alessio (collectively, the "Kondra Plaintiffs") and Plaintiff John M. Campbell, Jr., Esq. ("Campbell") as to the counterclaims for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, unjust enrichment, breach of fiduciary duty, negligence, and conversion asserted by the Nitschs. The Nitschs have appealed this Order and retained attorney Jeffrey Dunlaevy of Stephenson & Murphy, LLC to handle the appeal.

16. The Firm has provided clear notice to the Nitschs concerning its plans to withdraw and has taken steps to avoid foreseeable prejudice to the Nitschs. The date(s) of the notice(s) are available to the Court upon request.

17. The affiant has received confirmation of receipt by the Nitschs of the notice(s).

18. The Firm has not previously sought the relief requested herein.

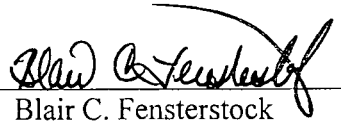
19. The Nitschs have failed to substantially fulfill an obligation to the Firm regarding the Firm's services or payment after being given reasonable warning that the Firm will withdraw unless the obligation is fulfilled. *See, e.g., Craig v. Law Office of Richard J. Breibart, LLC, Richard J. Breibart, and Rebecca West*, No. 2012-CP-32-03679, 2013 WL 10543435 (S.C.Com.Pl.) (Aug. 26, 2013) (granting counsel's motion to withdraw due to client's failure to pay outstanding fees).

20. Good cause for withdrawal exists. *Id.*

21. Accordingly, the affiant respectfully submits that withdrawal is necessary and permissible under South Carolina law.

22. Should the Court grant the Firm's Motion, the affiant further submits that the Firm will take steps to the extent reasonably practicable to protect the Nitschs' interests pursuant to Rule 1.16(d) of the South Carolina Rules of Professional Conduct.

23. Based on the foregoing, the Firm's Motion to withdraw as counsel for the Nitschs in the above-captioned matters should be granted.


Blair C. Fensterstock

Sworn to before me this
29 day of March, 2016


Notary Public

Glen A. Kendall, Esq.
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02KE6276630
Qualified in Kings County
Commission Expires Feb. 19, 2017

Exhibit D

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Emil P. Kondra individually, and as Trustee)
of the Emil P. Kondra Revocable Trust, Emil)
P. Kondra, LLC, Emil P. Kondra Family)
Trust, Eileen Saxton and Douglass E.)
Kondra, as Trustees of the Emil P. Kondra)
Family Trust, Douglass E. Kondra, Helen)
Perry, and Lawrence F. D'Alessio,)

**FENSTERSTOCK & PARTNERS LLP'S
MOTION TO WITHDRAW AS
COUNSEL FOR ROBERT A. NITSCH
AND VERONICA G. NITSCH**

Plaintiffs,)

C.A. No.: 2012-CP-23-06209

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

John M. Campbell, Esq.,)

Plaintiff,)

C.A. No.: 2012-CP-23-06211

vs.)

Robert A. Nitsch and Veronica G. Nitsch,)
Individually and as Trustees of the Amended)
and Restated Veronica G. Nitsch Revocable)
Trust and the Amended and Restated)
Robert A. Nitsch Revocable Trust,)

Defendants.)

TO: ALL COUNSEL OF RECORD

Pursuant to Rule 11(b) of the South Carolina Rules of Civil Procedure, movant,
Fensterstock & Partners LLP (the "Firm"), will move this Court, at such date and time as the

Court shall direct, to withdraw its appearance as counsel for Defendants Robert A. Nitsch and Veronica G. Nitsch, Individually and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust (the "Nitschs") in the above-captioned matters.

This Motion will be made on the following grounds:

1. The Nitschs have failed to substantially fulfill an obligation to the Firm regarding the Firm's services or payment after being given reasonable warning that the Firm will withdraw unless the obligation is fulfilled.


2. There will be no prejudice to the Nitschs should this Court grant the Firm's motion to withdraw.

3. The Firm has given the Nitschs reasonable notice of the Firm's intent to withdraw.

This Motion is based upon the Affidavit of Blair C. Fensterstock, which is attached hereto as Exhibit A, and applicable statutory and common law.

Dated: March 29, 2016

FENSTERSTOCK & PARTNERS LLP

By: 
Blair C. Fensterstock
100 Broadway, 8th Floor
New York, New York 10005
Telephone: (212) 785-4100

GIBBES BURTON LLC

By: s/Stephanie H. Burton
Stephanie H. Burton (#13089)
308 East St. John Street
Spartanburg, South Carolina 29302
Telephone: (864) 327-1725
Attorneys for Defendants

Exhibit E

80385

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

JUL 25 2016

Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Case No. 2012-CP-23-06209

Emil P. Kondra individually, and as
Trustee of the Emil P. Kondra
Revocable Trust, Emil P. Kondra,
LLC, Emil P. Kondra Family Trust,
Eileen Saxton and Douglass E.
Kondra, as Trustees of the Emil P.
Kondra Family Trust, Douglass E.
Kondra, Helen Perry, and Lawrence F.
D'Alessio,

Respondents

v.

Robert A. Nitsch and Veronica G.
Nitsch, Individually and as Trustees of
the Amended and Restate Veronica G.
Nitsch Revocable Trust and the
Amended and Restated Robert A.
Nitsch Revocable Trust

Respondents

Stephanie H. Burton and Gibbes
Burton, LLC

Appellants.

NOTICE OF APPEAL

Stephanie H. Burton and Gibbes Burton, LLC appeal the order of the Honorable Edward W. Miller dated June 21, 2016 to the extent that it denies their motion to be relieved as counsel for Defendants in this case. Appellants received written notice of entry of this order on June 21, 2016.

lac

July 21, 2016

s/Stephanie H. Burton
Gibbes Burton, LLC
308 East St. John St.
Spartanburg, South Carolina 29302
(864) 327-5000
Pro Se and attorneys for Appellant
Gibbes Burton, LLC

Other Counsel of Record and the Nitsch Defendants:

A.M. Quattlebaum, Jr.
Nelson Mullins Riley & Scarborough, LLP
PO Box 10084
Greenville, SC 29603-0084
864-250-2300

Jeffrey P. Dunlaevy
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, South Carolina 29601
(864) 370-9400

Blair C. Fensterstock
Fensterstock & Partners, LLP
100 Broadway, 8th Floor
New York, NY 10005

Robert A. Nitsch and Veronica G. Nitsch
8135 La Jolla Shores Drive
La Jolla, CA 92037

Exhibit F

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NUMBER: 2016-CP-23-

Veronica Nitsch and Robert Nitsch,)
)
Plaintiffs,)

vs.)

Blair C. Fenterstock,)
Eugene D. Kublanovsky and)
Stephanie Burton,)
)
Defendants.)

SUMMONS

Jury Trial Demanded!

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Charleston, South Carolina
August 8, 2016

BLAND RICHTER, LLP
Attorneys for Plaintiff

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr.
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE) CIVIL ACTION NUMBER: 2016-CP-23-

Veronica Nitsch and Robert Nitsch,)
)
Plaintiffs,)

vs.)

Blair C. Fenterstock,)
Eugene D. Kublanovsky and)
Stephanie Burton,)

Defendants.)

COMPLAINT
(Legal Malpractice /
Breach of Fiduciary Duty)

Jury Trial Demanded!

The Plaintiffs, complaining of the Defendants here, allege as follows:

Parties and Jurisdiction

1. Veronica Nitsch is a citizen and resident of Greenville County, South Carolina.
2. Robert Nitsch is a citizen and resident of Greenville County, South Carolina.
3. Upon information and belief, Defendant Blair Fensterstock (“Fensterstock”) is a citizen and resident of the State of New York who at all times relevant hereto was an attorney licensed to practice law by the State of New York and who was admitted to practice within the State of South Carolina on a *pro hac vice* basis as set forth herein below.
4. Upon information and belief, Defendant Eugene D. Kublanovsky (“Kublanovsky”) is a citizen and resident of the State of New York who at all times relevant hereto was an attorney licensed to practice law by the State of New York and who was admitted to practice within the State of South Carolina on a *pro hac vice* basis as set forth herein below.
5. Upon information and belief, Defendant Stephanie Burton (“Burton”) is a citizen and resident of Greenville County, South Carolina and at all times relevant hereto was an attorney licensed to practice law by the State of South Carolina.

6. This court has jurisdiction over the parties to and the subject matter of this litigation.

7. As to Defendants Fensterstock and Kublanovsky, this court has jurisdiction pursuant to the South Carolina Long Arm Statute, 36-2-802 and 803, in that the Defendants contracted to provide services in South Carolina, committed tortious acts in South Carolina and caused tortious injury in South Carolina. Additionally, by virtue of their applications to be admitted *pro hac vice* to the practice of law in South Carolina, these Defendants consented to the jurisdiction of the South Carolina courts.

Factual Background

8. The Defendants named above represented Robert and Veronica Nitsch (“the Nitsches” collectively or “Mr. Nitsch” and “Mrs. Nitsch” individually) in two matters which were pending in the Greenville County, South Carolina, Court of Common Pleas, which bear action numbers 2012-CP-23-6209 and 2011-CP-23-6211 and which are collectively referred to hereinafter as the “Underlying Case” or the “South Carolina Litigation.”

9. At the heart of the present dispute lies the Defendants’ failure either to properly analyze the statute of limitations as a likely bar to the Nitsches’ claims in the Underlying Case and/or their failure to advise their clients properly as it relates to likelihood that the claims that the Nitsches wished to pursue in the Underlying Case were time barred.

10. Through greed, incompetence or both, the Defendants urged the Nitsches to continue in the pursuit of claims which they knew or should have known were likely time-barred, and in doing so, to cause the Nitsches to incur approximately \$5,000,000.00 in legal fees.

11. The time line for the evaluation of the statute of limitations as a potential bar to the claims in the Underlying Case begins in 1964. The Underlying Case was commenced in 2012 – 48 years later.

12. In or around 1964, a stock transaction took place involving a then New York based company known as Ellcon-National, Inc. (“Ellcon”).

13. Ellcon’s primary business was the development, manufacture and sale of railroad car braking systems.

14. As a result of the 1964 stock transaction, Mr. Nitsch became a shareholder of Ellcon, as well as a member of its Board of Directors.

15. Mrs. Nitsch had been employed as a receptionist with Ellcon starting in 1963, but she left her employment with Ellcon soon before marrying Mr. Nitsch in 1965.

16. In describing the 1964 stock transaction in the Underlying Case, the Defendants pleaded on behalf of their clients that another shareholder, Emil Kondra (“Kondra”) issued a dividend to himself of 60 shares in Ellcon which was a dividend that no other shareholder received.

17. The 1964 transaction was documented in a Stock Purchase Agreement, which indicated Emil Kondra had purchased an additional 1,460 shares (for a total of 1,520 shares), and Robert Nitsch had purchased 200 shares.

18. In the Underlying Case, the Defendants described the 1964 transaction as “an early step in Emil Kondra’s fraudulent course of conduct.”

19. This alleged “fraudulent course of conduct” would ultimately become the basis of the claims which the Defendants advanced on behalf of the Nitsches beginning in 2012.

20. For the most part, the claims which the Defendants advised the Nitsches to pursue were governed by a three year statute of limitations. More specifically, three years from the date that the Nitsches first knew or should have known of the existence of the claims.

21. In an apparent effort to cure an obvious statute of limitations problem, when the Defendants brought claims on behalf of the Nitsches in the Underlying Case, they pleaded that Emil Kondra's conduct "over the next several decades" following the 1964 stock transaction was not discoverable by the Nitsches due to Emil Kondra's "deceptiveness and secrecy" until late 2010.

22. While the Defendants may have had a factual basis to allege that Emil Kondra was deceptive and/or secretive, they also knew that Mr. Nitsch sat on the Board of Directors of Ellcon every year from 1964 through the eventual sale of Ellcon in 2008.

23. While the Defendants may have had a factual basis to allege that Emil Kondra was deceptive and/or secretive, they also knew that as a member of the Board of Directors, Mr. Nitsch was entitled to full and unfettered access to the books and records of Ellcon every year from 1964 through 2008 (and beyond).

24. While the Defendants may have had a factual basis to allege that Emil Kondra was deceptive and/or secretive, they also knew that a court would likely find that by virtue of his seat on the Board of Directors, Mr. Nitsch was charged with knowledge of the content of the books and records of Ellcon whether he chose to review them or not.

25. In advising the Nitsches to pursue claims against Emil Kondra in 2012, the Defendants knew that the number of shares owned by each shareholder was disclosed annually to all Ellcon shareholders, including the Nitsches, each and every year since 1964.

26. In advising the Nitsches to pursue claims against Emil Kondra in 2012, the Defendants knew that Ellcon held an annual shareholder meeting every year since 1964, and that the minutes of each such meeting were provided to every shareholder, including the Nitsches. These minutes listed each shareholder's name and the number of shares owned by that shareholder.

27. In advising the Nitsches to pursue claims against Emil Kondra and others in 2012, the Defendants knew that every year between 1964 and 2008, the annual shareholder meeting minutes and the stock lists were unanimously approved by the shareholders, including Mr. Nitsch.

28. As if the 1964 transaction and Mr. Nitsches' seat on the Board of Directors from 1964 through 2008 were not problematic enough as it relates to the evaluation of the statute of limitations as a potential bar to the Nitsches' claims in the Underlying Case, the Defendants knew of many other potential trigger dates which may have implicated the statute of limitations as a defense to the Nitsches' 2012 claims.

29. In the Underlying Case, the Defendants pleaded on behalf of the Nitsches that they were further defrauded by Emil Kondra and others as a result of a 1985 stock transaction.

30. The 1985 stock transaction occurred approximately 27 years before the Defendants brought the Nitsches' claims in the Underlying Case.

31. Robert Nitsch served on the Ellcon Board of Directors in 1985 and for every year thereafter through 2008.

32. Prior to advising the Nitsches to pursue claims in 2012 which would ultimately cost them approximately \$5,000,000.00 in legal fees, the Defendants also knew that beginning in the early 2000's and continuing through 2007, Helen Kondra, the wife of Emil Kondra, informed

Mrs. Nitsch that Emil Kondra was destroying or causing to be destroyed Ellcon corporate records.

33. Prior to advising the Nitsches to pursue claims in 2012 which would ultimately cost them approximately \$5,000,000.00 in legal fees, the Defendants knew that between 2000 and 2007 Helen Kondra provided Mrs. Nitsch with stacks of documents in large black plastic bags. These documents would ultimately become known as the "Disputed Documents" in the Underlying Case and will be so referenced herein.

34. Prior to advising the Nitsches to pursue claims in 2012 which would ultimately cost them approximately \$5,000,000.00 in legal fees, the Defendants knew that between 2000 and 2007 Mrs. Nitsch reviewed the Disputed Documents and that they revealed "misconduct by Emil Kondra" and others. Mrs. Nitsch shared her concerns with Mr. Nitsch.

35. Prior to advising the Nitsches to pursue claims in 2012 which would ultimately cost them approximately \$5,000,000.00 in legal fees, the Defendants knew that Mrs. Nitsch kept the Disputed Documents expressly to "pursue any claims" that she and her husband may have had against Emil Kondra and others.

36. Prior to advising the Nitsches to pursue claims in 2012 which would ultimately cost them approximately \$5,000,000.00 in legal fees, the Defendants knew that Mrs. Nitsch had provided the Disputed Documents to other attorneys.

37. The Defendants knew or should have known that in analyzing the statute of limitations, the trigger date would be viewed as the first date that the Nitsches knew or should have known that they had claims against Emil Kondra and/or others, even if the full extent of their harm or the full theory of recovery was not known.

38. As such, the Defendants knew or should have known that a future court would likely conclude that the compilation and analysis of records by Mrs. Nitsch between 2000 and 2007, which caused her to believe that Emil Kondra and others had committed acts of corporate fraud triggered the running of the statute of limitations. This is especially true given the fact that the Defendants knew that the Nitsches had shared the very same documents with other lawyers during the same time period.

39. Beginning in or around 2008, Faiverley Transport USA, Inc. ("Faiveley") entered into discussions with Ellcon to either merge with and/or acquire Ellcon. These discussions culminated in the Ellcon / Faiverley merger on July 31, 2008 (the "Merger").

40. As discussions progressed between Ellcon and Faiverley, the Nitsches expressed objections to the proposed transaction out of concern that they would be receiving less than their full value from the transaction as their stock position had been diluted by virtue of Emil Kondra's prior fraudulent conduct dating back to 1964.

41. The Defendants knew prior to advising the Nitsches to pursue their 2012 claims that in advance of the 2008 Merger, the Nitsches had hired New York attorneys to perform due diligence on the Merger for the Nitsches.

42. The Defendants knew prior to advising the Nitsches to pursue their 2012 claims that in advance of the 2008 Merger, the Nitsches' New York counsel had sent an extensive list of due diligence questions to Ellcon and had requested voluminous company records from Ellcon, notwithstanding the fact that Robert Nitsch always had ready access to the information and records requested by virtue of his seat on the Board of Directors.

43. The Defendants knew prior to advising the Nitsches to pursue their 2012 claims that Robert Nitsch actually moved to approve the Merger at a meeting of the Ellcon Board of

Directors in 2008, at which meeting the Board recommended the Merger to the Ellcon shareholders.

44. The Defendants knew prior to advising the Nitsches to pursue their 2012 claims that the Merger was closed on July 31, 2008. The Defendants also know that through the Merger, the Nitsches personally received \$6,784,611.94 in pre-tax consideration for their interests in Ellcon.

45. Following the Merger, the Nitsches continued to hold suspicions that Emil Kondra, and perhaps others, had deceived them as it related to their true stock ownership, as a result of which they did not receive proper consideration for their interests in the Merger.

46. Pursuant to the Merger agreement, if the Nitsches believed that they had any claims that survived the Merger, they were required first to mediate the claims and then to arbitrate the matters if mediation proved unsuccessful.

47. In or around November 2011, the Nitsches initiated mediation with Emil Kondra and Ellcon, but the mediation led to no meaningful settlement discussions.

48. Thereafter, the Nitsches contacted Defendant Fensterstock to discuss the prospects for initiating arbitration proceedings. The Nitsches found Fensterstock through a search for New York based attorneys because the Merger agreement's arbitration clause provided that arbitration was to take place in New York.

49. On or about August 2012, Defendant Fensterstock flew to San Diego, California to meet with the Nitsches, who were staying at the time with Mrs. Nitsch's brother.

50. During the meeting, the history of the dispute dating back to 1964 was discussed with Defendant Fensterstock.

51. During the meeting, Mrs. Nitsch also revealed to Fensterstock the existence of the Disputed Documents and the circumstances by which they were obtained.

52. While the circumstances surrounding how the Disputed Documents were obtained and what they contained should have caused concern to any reasonable and competent legal counsel, Defendant Fensterstock expressed no reservation in utilizing the Disputed Documents for the anticipated arbitration proceedings. The Disputed Documents were thereafter forwarded to Defendant Fensterstock in New York.

53. During the meeting in San Diego, Mrs. Nitsch's brother asked Defendant Fensterstock whether the statute of limitations was a concern in going forward with claims. Defendant Fensterstock was dismissive of the issue and assured both Mrs. Nitsch and her brother that the statute of limitations would not be an issue in any future proceedings.

54. Defendant Fensterstock told the Nitsches that they had good and valuable claims.

55. The Nitsches hired Defendant Fensterstock to file claims against Emil Kondra and others in arbitration.

56. At the time, Veronica Nitsch was 69 years of age. Robert Nitsch was 84 years old and was in failing health.

57. While the Nitsches had received a sizable amount of money through the Merger, the money represented their lives' work and their future source of income and security. They were not willing to place their nest egg at risk unless they felt that the costs were acceptable and the likelihood of success was high.

58. Defendant Fensterstock assured the Nitsches that they had good and valuable claims and that the costs of litigation would be reasonable.

59. Satisfied that the costs would not place them in jeopardy and in reliance upon Defendant Fensterstock' s assurance that they had good claims with a high likelihood of success, the Nitsches authorized Defendant Fensterstock and his partner, Defendant Kublanovsky, to proceed with arbitration to be filed in New York against Emil Kondra, Ellcon and others. The Nitsches wrote an initial check of \$10,000.00 to commence the arbitration.

60. On September 11, 2012, 4 years after the Merger, 27 years after the 1985 stock transaction and 48 years following the 1964 stock transaction, Defendants Fensterstock and Kublanovsky filed a Demand for Arbitration before the American Arbitration Association in New York.

61. After being served with the Demand for Arbitration, Emil Kondra and others initiated the two separate actions in South Carolina, (the "South Carolina Litigation" or the "Underlying Case"). The South Carolina Litigation sought primarily declaratory relief, including a declaration from the court that prior to the Merger, the Nitsches had "actual or constructive knowledge of the ownership of the shares in Ellcon" and that:

- "As shareholders with ready access to financial records of Ellcon, the doctrine of laches and/or the statute of limitations prevent the Defendants from disputing stock transactions that occurred in 1964 and 1985."

62. The South Carolina Litigation sought to stay the arbitration in New York and to dispose of the Nitsches' claims.

63. Both Defendants Fensterstock and Kublanovsky independently owed duties to the Nitsches to evaluate the positions being asserted in the South Carolina Litigation and to provide full, complete and competent advice and analysis upon which the Nitsches could make reasonable and intelligent decisions going forward.

64. Despite the open and obvious roadblock that the statute of limitations defense presented to the ultimate success on the merits of any claim held by the Nitsches, neither Defendant Fensterstock nor Defendant Kublanovsky warned of the risk and/or recommended against the continued pursuit of the claims.

65. To the contrary, despite the fact that Merger agreement provided for arbitration in New York and the fact that litigation in South Carolina would likely require more time and more money, as well as the need for local counsel to sponsor Defendant Fensterstock and Defendant Kublanovsky as *pro hac vice* counsel, Fensterstock told the Nitsches that “we will just fight them in South Carolina.”

66. In light of the fact that the matter appeared to be heading for litigation in South Carolina, the Nitsches requested an estimate of costs for the South Carolina Litigation. Defendant Fensterstock provided an estimate of \$570,000.00 to prosecute the matter in South Carolina. A copy of the estimate is attached hereto as **Exhibit A**. Although the Nitsches did not desire to litigate in South Carolina, they deferred to the judgment of Defendant Fensterstock.

67. Upon information and belief, in or around November, 2012, Defendant Burton agreed to represent the Nitsches and to serve as the local counsel in order to sponsor Defendants Fensterstock and Kublanovsky on a *pro hac vice* basis.

68. Defendant Burton independently owed duties to the Nitsches to evaluate the positions being asserted on their behalves and to provide full, complete and competent advice and analysis upon which the Nitsches could make reasonable and intelligent decisions going forward.

69. Despite the obvious roadblock that the statute of limitations defense presented to the ultimate success on the merits of any claim held by the Nitsches, Defendant Burton did not

warn of the risk and/or recommend against the continued pursuit of the claims – at least not until four years and \$5,000,000.00 later as described herein below.

70. Having embroiled his clients in a foreign war, Defendant Fensterstock quickly exceeded his earlier estimate on fees.

71. Between September and December, 2012, Defendants Fensterstock and Kublanovsky charged the Nitsches \$696,679.87.

72. For the year 2013, Defendants Fensterstock and Kublanovsky charged the Nitsches an additional \$2,118,101.24.

73. For the year 2014, Defendant Fensterstock charged the Nitsches an additional \$1,005,503.32.

74. In order to pay the legal invoices and in her mind so as not to jeopardize their retirement, Mrs. Nitsch began paying the legal invoices by taking loans against the stock investments that the Nitsches had purchased with the after tax dollars remaining from the Merger.

75. The loans against the stock portfolio grew over time to the point that the interest only payments against the loan today are in excess of \$10,000.00 per month.

76. The Nitsches are in the process of selling their home in Greenville, South Carolina to deal with the aftermath.

77. In addition to the sums paid to Defendants Fensterstock and Kublanovsky, substantial sums were also paid to Defendant Burton.

78. Defendant Fensterstock has invoiced the Nitsches for an additional sum of \$1,084,028.71, which remains unpaid.

79. For all of the money paid to the Defendants, only two depositions were taken in the Underlying Case.

80. Much of the time and effort expended by the Defendants and paid for by the Nitsches surrounded the abusive discovery practices of Defendants Fensterstock and Burton.

81. When the Defendants chose to use approximately 28,000 documents contained within the Disputed Documents, many of which included privileged communications between Emil Kondra and/or Ellcon and its legal counsel, the attorneys for Kondra and Ellcon objected and moved the court for relief.

82. On May 3, 2013, counsel for the Kondra parties in the Underlying Case sent a letter to the Defendants requesting that the Disputed Documents be returned soon after learning of their existence.

83. At a hearing before the Court on September 18, 2013, the Defendants agreed to return any original Disputed Document in their possession to counsel for the Kondras.

84. On September 23, 2013, the Defendants then told the Kondras' counsel that they had no original Disputed Documents.

85. Thereafter, during the deposition of a witness on February 11, 2014, the Defendants sought to use four Disputed Documents which were identified and objected to by the Kondras' legal counsel.

86. On February 19, 2014, counsel for Mr. John Campbell (one of the Kondra parties) emailed the Defendants requesting once and for all a return of all Disputed Documents. The Defendants refused.

87. On April 14, 2014, a Motion for Protective Order and Motion for Sanctions against the Nitsches was filed as a result of the Defendants' use of the Disputed Documents.

88. At an April 29, 2014, hearing before the Court, Judge Miller cautioned the Defendants that “if you’re in possession of privileged documents that were stolen, you need to give them back.”

89. On May 15, 2014, counsel for the Kondra parties sent a letter to Defendant Burton identifying 149 Disputed Documents over which they claimed privilege.

90. Despite prior assurances that the Defendants were not in possession of any such documents and prior warnings from the Court to return all such documents, Defendant Burton then sent a letter dated June 3, 2014, asserting the position that none of the 149 documents were truly privileged and that the privilege had been waived in any event.

91. On February 15, 2015, Judge Miller appointed a Discovery Referee to evaluate and determine the status of the Disputed Documents.

92. In an effort to explain their discovery abuses, the Defendants prepared affidavits for Veronica Nitsch’s signature which explained the circumstances under which she originally came into possession of the Disputed Documents.

93. In a Report and Recommendation dated August 2, 2015, the Discovery Referee resoundingly rejected the positions being asserted by the Defendants with regard to the Disputed Documents.

94. The Discovery Referee went further to advise the Court that the discovery dispute was ultimately moot anyway because the Nitsches’ claims were time barred. In making his finding, the Special Referee relied in large part on very affidavits of Veronica Nitsch which had been prepared for her signature by the Defendants:

- “In this case, counsel for the Nitsches submitted three (3) affidavits by Mrs. Nitsch ... which support my finding that the applicable statute of limitations

began to run not later than 2005... The statements contained in Mrs. Nitsch's sworn affidavits evidence that starting no later than 2005, Mrs. Nitsch carefully photocopied and catalogued the mass of documents taken from Emil Kondra and incorporated them into spreadsheets that she 'created ... to aid [her] attorneys in evaluating [her] claims against Plaintiffs.'" Affidavit of Veronica Nitsch, attached hereto as **Exhibit B**.

95. In addition to stating that the Nitsches had gathered the documents for the purpose of evaluating claims against Emil Kondra, the affidavit of Veronica Nitsch went further to disclose that the Disputed Documents had been shared with a number of attorneys, including Snow Becker Krauss, Merline & Meachum, the Hutton Law Group and Blake Harper.

96. While the consultation with other counsel regarding the Disputed Documents should have alerted any reasonable and competent attorney of the likelihood that the statute of limitations had expired, as it pertains to Merline & Meachum, the affidavit prepared by the Defendants is clear that they knew Veronica Nitsch had consulted with Merline & Meachum regarding "questions about Emil Kondra's self-dealing under the guidance of John Campbell."

97. The Discovery Referee recommended that sanctions issue against Mrs. Nitsch, which recommendation was supported by the Defendants' "failure to abide by their ethical obligations."

98. On September 29, 2015, the Court adopted the Report and Recommendation and granted summary judgment dismissing the Nitsches' claims completely based upon the expiration of the statute of limitations.

99. Subsequently, counsel for the Kondra parties filed a Petition for Attorneys' Fees, requesting \$120,251.50 in fees that were expended in response to the Defendants' unethical

discovery practices and also filed Motions for Summary Judgment based upon the expiration of the statute of limitations.

100. The Petition for Attorneys' Fees was supported by the affidavit of the former Chief Justice of the 4th Circuit Court of Appeals, William W. Wilkins, who stated in part:

- "The two attorneys interviewed stated that the facts and circumstances of this case constitute discovery tactics not seen by counsel for the Kondra Plaintiffs and Mr. John Campbell in their combined experience of over 55 years of practice. I concur completely, for during my years in private practice and 27 years on the bench, I have never seen a similar situation."

101. Thereafter, the Defendants entered an opposition to the request for fees and costs and questioned the reasonableness of the request.

102. The Defendants did not reveal to the Court that they had been paid and/or billed nearly \$5,000,000.00 by the Nitsches.

103. The Court granted the Petition for Attorneys' Fees and issued a judgment in the amount of \$ 120,251.50 against the Nitsches. The Court also issued an order granting summary judgment against the Nitsches based upon the expiration of the statute of limitations.

104. In an effort to mitigate the harm inflicted upon them by their failed legal representation, the Nitsches incurred more expense to hire yet another law firm and to file an appeal of the grant of summary judgment. Notice of Appeal was filed on January 21, 2016.

105. On January 27, 2016, Defendant Burton emailed the Nitsches and copied their new counsel urging the Nitsches to accept a settlement proposal in which the Kondra parties would waive the \$120,251.50 discovery judgment in exchange for the Nitsches agreement to abandon the appeal.

106. In urging the Nitsches to accept the proposal, Defendant Burton made the following observation on the statute of limitations:

- While the current ruling on the statute of limitations is not well-reasoned, if you win on appeal, the case will be remanded back to the trial court. Thus, you will then have to proceed with the case in the trial court by taking depositions and the like. I believe that at the conclusion of the depositions, you will face a motion for summary judgment on, among other things, that the statute of limitations bars any claim relating to the 2008 transaction. As we discussed, under South Carolina law, the statute of limitations begins to run when one knows, or should know through the exercise of reasonable diligence, that some right of his has been evaded. It is not necessary to have a full-blown theory of recovery or even to know everyone against whom a claim may be asserted for the statute of limitations to begin to run. I believe that **there is a very strong possibility that a court will conclude that the statute began to run no later than at the time of the 2008 transaction** and thus expired in 2011 or earlier. To get to this point, it will cost you significant attorney's fees and costs.
- **I believe that you are going to spend a significant amount of money and not achieve a favorable result** which will continue to take an adverse toll upon you.
- The Email from Defendant Burton is attached hereto as **Exhibit C**.

107. Defendant Burton's advice was well-founded, but was 4 years and \$5,000,000.00 too late.

**For a First Cause of Action
Legal Malpractice / Gross Negligence**

108. The paragraphs enumerated above are incorporated herein as if realleged and restated in full verbatim.

109. At all times relevant hereto, the Defendants, and each of them, were in an attorney client relationship with the Nitsches, as a result of which the Defendants owed duties to the Nitsches, including the duty to possess and to exercise the same degree of care skill and learning as is possessed by a reasonable and competent attorney under the same or similar circumstances.

110. The Defendants, and each of them, breached their duties to the Nitsches and otherwise acted in a negligent, grossly negligent, willful and wanton manner in a number of particulars, including but not necessarily limited to the following:

- a. In failing to analyze the statute of limitations as a likely bar to the Nitsches' claims in the Underlying Case before recommending that the Nitsches go forward with the prosecution of their claims;
- b. In failing to advise the Nitsches that the statute of limitations was a likely bar to their claims before recommending that the Nitsches go forward with the prosecution of their claim;
- c. In filing claims which reasonable and competent lawyers should have recognized were likely time barred;
- d. In failing to revisit the statute of limitations and to analyze its likely bar to recovery after the Kondra parties filed their declaratory judgment actions in the Underlying Case asking the court to find that the Nitsches' claims were time barred;
- e. In engaging in abusive discovery practices which resulted in a sanction of \$120,251.50 being issued against their client; and
- f. In such other particulars as the evidence in the case may demonstrate.

111. The Defendants should not have filed their Demand for Arbitration knowing that in all likelihood the court would conclude that the claims were time barred.

112. Even after bringing the Demand for Arbitration, there were many points in time when the Defendants should have realized the significance of the statute of limitations defense (ie. at the time the South Carolina Litigation was commenced) and should have advised the

Nitsches against the continued expenditure of time and money on claims that would in all likelihood ultimately be determined to be time barred. No such advice was ever given until AFTER the claims were dismissed.

113. Had the Nitsches been properly informed as to the likely bar that was presented by the statute of limitations defense, they would not have initiated and/or continued the prosecution of their claims through the Underlying Case. But for the conduct of the Defendants, the Nitsches would not have spent and/or incurred approximately \$5,000,000.00 in legal expenses, would not have been subject to sanctions by a South Carolina Court, would not owe substantial loans against their stock portfolio for which they continue to pay more than \$10,000.00 per month, and would not be in a posture where they are forced to sell their home.

114. The Nitsches had an absolute right to rely upon the advice of their legal counsel and they did so rely to their substantial detriment.

115. As a direct and proximate result of the conduct of the Defendants, the Nitsches have suffered damages and continue to suffer damages. The Nitsches are entitled to an award of actual damages to compensate them for all losses occasioned herein, whether past, present or future, and punitive damages, in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

**For a First Cause of Action
Breach of Fiduciary Duty**

116. The paragraphs enumerated above are incorporated herein as if realleged and restated in full verbatim.

117. At all times relevant hereto, the Defendants were in a fiduciary relationship with the Nitsches, by virtue of which the Defendants owed the Nitsches duties, including the duty of the utmost trust and confidence and the duty to act single-mindedly in the best interest of the

Nitsches and not to allow such interests to be clouded by other interests, including most significantly the Defendants' own interests.

118. The Defendants knew or should have known that the Nitsches' claims were time barred, yet they never advised against the initiation and/or continued prosecution of the claims.

119. As the Defendants charged the Nitsches millions of dollars in legal fees, they knew or should have known that it was highly unlikely that the claims they were prosecuting would result in any recovery whatsoever. Still, the Defendants encouraged the Nitsches to continue in the prosecution of their claims.

120. The Defendants permitted their own interests in being paid millions of dollars in legal fees to prevail over the best interests of the Nitsches.

121. The best interests of the Nitsches would have been served by declining their representation and recommending against the initiation and/or continued prosecution of the Nitsches' claims.

122. Had the Defendants been motivated by the best interests of the Nitsches, they would not have initiated and/or continued the prosecution of the Nitsches' claims through the Underlying Case. But for the conduct of the Defendants, the Nitsches would not have spent and/or incurred approximately \$5,000,000.00 in legal expenses, would not have been subject to sanctions by a South Carolina Court, would not owe substantial loans against their stock portfolio for which they continue to pay more than \$10,000.00 per month, and would not be in a posture where they are forced to sell their home.

123. The Nitsches had an absolute right to believe that the Defendants were acting at all times in their best interests. They were not.

124. As a direct and proximate result of the conduct of the Defendants, the Nitsches have suffered damages and continue to suffer damages. The Nitsches are entitled to an award of actual damages to compensate them for all losses occasioned herein, whether past, present or future, and punitive damages, in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants for actual damages in an amount determined by a jury to be sufficient to compensate them fully for all losses occasioned herein, whether past, present or future, and separately for an award of punitive damages, in an amount deemed by a jury sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future, together with such additional relief as the court deems just and proper.

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Charleston, South Carolina
August 8, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209

RECEIVED
AUG 18 2016
SC Court of Appeals

Emil P. Kondra individually, and as
Trustee of the Emil P. Kondra
Revocable Trust, Emil P. Kondra,
LLC, Emil P. Kondra Family Trust,
Eileen Saxton and Douglass E.
Kondra, as Trustees of the Emil P.
Kondra Family Trust, Douglass E.
Kondra, Helen Perry, and Lawrence F.
D'Alessio,

Respondents

v.

Robert A. Nitsch and Veronica G.
Nitsch, Individually and as Trustees of
the Amended and Restate Veronica G.
Nitsch Revocable Trust and the
Amended and Restated Robert A.
Nitsch Revocable Trust

Respondents

Stephanie H. Burton and Gibbes
Burton,-LLC

Appellants.

PROOF OF SERVICE

I certify that I served the Appellants' Memorandum of Law as to the Issue of Appealability of Order and Affidavit of Stephanie H. Burton by depositing copies of them in the U.S. Mail addressed to the Nitsch Respondents and counsel, as follows:

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August 15, 2016

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